In The Supreme Court of the United States

_____TERM, 1978

No. 78-89

THE STATE OF NORTH DAKOTA
Plaintiff — Appellee
-vs.-
JULIE GOELLER,
Defendant - Appellant

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE UNITED STATES

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In The Supreme Court of the United States

_____TERM, 1978

No._____

THE STATE OF NORTH DAKOTA,
Plaintiff - Appellee
-vs-
JULIE GOELLER,
Defendant - Appellant

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF UNITED STATES.

TO: The Honorable and Chief Justice and Associate Justices of the Supreme Court of the United States.

DEFENDANT HEREIN, Julie Goeller, petitions for Writ of Certiorari as follows:

OPINIONS BELOW

The Supreme Court of North Dakota's Order Denying Petition for Rehearing was entered on 13th day of April, 1978. The original Opinion of the Supreme Court of North Dakota was entered on the 17th day of February, 1978 and is reported at 263 NW 2d, at page 135. (See appendix A of this Petition for Opinion of Supreme Court and Order Denying Petition for Rehearing.)

JURISDICTION

The jurisdiction of this Court is involked pursuant to Article III, Sections 1 and 2 of the Constitition of United States of America; Title 28, Section 2101 (e) United States Code; and Rule 22, Subsection 1 of the Rule of the Supreme Court of United States. The dates of the orders of the Supreme Court of North Dakota and the order denying petition for rehearing sought to be reviewed and the time of entry are:

1. Decision of the North Dakota Supreme Court dated January 17, 1978.

2. Order Denying Petition for Rehearing, Supreme Court of North Dakota, dated April 13, 1978.

QUESTIONS PRESENTED

1. May a Special Agent of the United States Air Force Reserve, who performs criminal investigations, sit as a fair, and impartial magistrate in a criminal proceeding for purposes of issuing search warrants, conducting initial appearances, setting bonds, issuing contempt citations and ordering imprisonment?

2. Is a search warrant affidavit by a police officer sufficient to establish probable cause where it recites conclusions of a second police officer informing affiant second police officer believed he had purchased marijuana at the address to be searched?

3. Was the defendent denied due process in not being taken before a fair and impartial magistrate in a timely manner; in not being given access to counsel; in being denied the right to make a phone call; in having no record

made of an initial appearance some 38 hours after her arrest at which time she was found in contempt of court and sentenced to 10 days in jail; in having the magistrate allowing the defendant to bargain for her release from a 10 day jail sentence, at the end of 5 days, upon a promise she would not appeal to the North Dakota Supreme Court and in having a magistrate who displayed bias and prejudice against the defendant in deliberately approving a delay in arraignment; in making false, inaccurate and misleading statements regarding her character; in failing to keep a verbatim record of the proceedings before him; in bargaining for her release from jail by her promise not to appeal; and in using his position as a Special Criminal Investigator for the United State Air Force Reserve to intimidate those with whom his court came in contact in connection with the case?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of United States of America:

1. Article IV — the right to be secure in ones person and effects against unreasonable search and seizure.

2. Article IV — the right to be secure from warrants except those issued upon probable cause supported by oath or affirmation.

3. Article V — the right to due process of law.

4. Article VI — the right to meaningful and timely assistance of counsel.

5. Article VII — the right to timely bail.

STATEMENT OF THE CASE

On March 30, 1977 at approximately 11:00 p.m. the defendant Julie Ann Goeller was arrested, charged and jailed for possession of less than two ounces of marijuana.

On the night of the arrest, a number of peace officers with a search warrant waited outside the multiple dwelling where defendant was visiting friends. Two undercover police agents sought entrance by going to the front door, knocking, and asking to talk to one Sheldon Seaborn, an individual who had been there earlier. The officers were admitted although it was not known who they were nor that they came with intention to search.

Upon entering the kitchen area, the agents claimed to have smelled the odor of burning marijuana and observed two men and two women at the kitchen table. One of those seated there was the defendant. The agents observed substances on the kitchen table which they have stated they believed to be marijuana. Shortly thereafter the defendant recognized one of the men as being an undercover agent. The other peace officers waiting outside with the search warrant were immediately radioed and these officers then entered the house also.

No controlled substance was found on the person of any of the individuals on the premises. All were charged with possession of marijuana. Three males who resided in the apartment either plead guilty or were convicted of possession. The one female present, other than the defendant, was charged but found not guilty at the trial. The defendant herein plead not guilty but was found guilty. She appealed her conviction and the conviction was upheld by the North Dakota Supreme Court. (Decision attached.)

The defendant was held without initial appearance, arraignment, bail, telephone call or benefit of counsel for approximately 38 hours and 45 minutes. When she finally did appear an unrecorded partial arraignment took place. The presiding magistrate, in what the North Dakota Supreme Court has characterized as "judicial overkill" found the defendant in contempt of court apparently upon a claim she had giggled and sentenced her to 10 days in jail. At the end of 5 days she bargained her way out of jail by promising not to appeal the contempt citation. (See Finding of North Dakota Judicial Qualification Committee.)

Motions to suppress were brought prior to trial raising the various issues appealed herein but same were denied by the trial judge. (See Transcript of Motion prior to trial pages 2-17.)

Since the above events a complaint has been filed, hearings were held against this presiding magistrate and findings of fact, conclusions of law and recommendations were made by the North Dakota Judicial Qualifications Commission as follows:

1. The magistrate willfully caused and allowed an unreasonable delay in the arraignment of Julie Ann Goeller between March 31, 1977 and April 1, 1977 by failing to bring her before himself. Although he was made aware of her incarceration and had adequate opportunity to hold an appearance, he failed to arraign her within a reasonable time for the reason he did not believe the defendant was taking the matter seriously enough.

2. The magistrate communicated the fact of delay and the reason for delay at the arraignment to at least

three persons in the manner indicating not only his knowledge of the delay but his approval as well.

3. The magistrate in this case made statements against this defendant which were false, inaccurate and misleading regarding her character.

4. The magistrate in this case failed to comply with the North Dakota Rules of Criminal Procedure in the course of arraigning this defendant by not having a verbatim record of the proceedings kept either by the Court Reporter or even by a mechanical recording devise.

5. The magistrate willfully gave the appearance of entering into and bargaining five days of a criminal contempt sentence with this defendant in exchange for a promise on her part not to file an appeal.

6. The magistrate is a Reservist in the United States Air Force and is a Special Agent of the Office of Special Investigation for that military organization and has conducted numerous investigation regarding criminal matters under the various missions of the Air Force Office of Special Investigation.

7. The magistrate on at least five occasions displayed to at least 8 individuals a badge or other credentials issued to him as an Air Force Reservist with the apparent purpose of impressing the viewers with the fact that he held such an assignment and the effect of his doing so created in the minds of those individuals an impression he was involved in investigations for the purpose of prosecution while at the same time sitting as a judge in similar matters.

The North Dakota Judicial Qualifications Commis-

sion recommended suspension from office for the above magistrate for a period of not less than 90 days and as a condition of reinstatement he must make a significant study of judicial conduct and judicial ethics or such other appropriate study as the Supreme Court of North Dakota might deem necessary.

Those findings and recommendations are now before the Supreme Court of North Dakota for approval, modification, or rejection.

REASONS FOR GRANTING WRIT

I.

Assuming the defendant in this case were in possession of marijuana at the place she was arrested, at minimum she was entitled to have the search warrant by which the second wave of officers gained entrance, issued by a fair and impartial magistrate. A magistrate must be impartial and detached and must be capable of determining whether probable cause exists for a requested arrest, search or seizure. *Shadwick vs. City of Tampa*, 407 U.S. 345 L. Ed. 2d 783 at 788 (1972).

A Special Agent, who is a criminal investigator for the United States Air Force, and who is currently involved in criminal investigations in the area, can not possibly sit as a fair and impartial magistrate. *Johnson vs. United States*, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367; cf. *Camera vs. Municipal Court of San Francisco*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); *Coolidge vs. New Hampshire*, 403, U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, rehearing denied 505, U.S. 874, 30 L. Ed. 2d 120, 92 S. Ct. 29.

The magistrate in this case not only issued a search warrant based upon an insufficient affidavit as is set forth in paragraph 2 below but also imposed an unreasonable delay on defendant's appearance before him, denied her right to counsel and telephone, denied her bond, and when she finally did appear before him failed to keep a record of the proceedings and in conducting the proceedings found her in contempt of court and sentenced her to 10 days in jail in an event that has been characterized by the North Dakota Supreme Court as "judicial overkill". See State v. Geoller, 263 NW 2d page 135.

II.

To establish probable cause for the issuance of a search warrant in this case a police officer presented an affidavit to the magistrate reciting he had talked to yet another police officer, whom he believed to be credible, and that officer told him he had purchased two bags, believed to be marijuana, from an individual who lived at 213 College Street and accordingly a search warrant for that address should be issued. (Copy of the affidavit of Bernard Kracht hereto attached). A warrant must state the particular grounds justifying its issuance. SGRO vs. U.S. 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 263 (1932). Even in North Dakota, heretofore the Supreme Court has held a magistrate should not accept the mere conclusions of a person who makes application for a warrant and claims that grounds for the issuance of a warrant exit. *State v. Dove*, 182 NW 2d 297. (ND 1970) At the very least the affidavit supporting this search warrant should have specified the time of the alleged conversation between officers, should have specified the time of the alleged purchase of marijuana, should have given the basis upon which the officer believed the previous purchase gave

cause to think there would be more at the particular residence sought to be searched. There is no basis in his affidavit or warrant to show the existence of present unlawful activity at the premises to be searched. In addition the belief a substance was marijuana was a bare conclusion and insufficient to support issuance of a search warrant. There is no information connecting the premises to be searched or this defendant to the earlier activity of the police officer who thought he had purchased marijuana from some third party, unrelated to this defendant.

III.

The defendant in this case has been denied due process. Even though there was opportunity to do so, she was not taken before a magistrate for over 38 hours after her arrest and was not given an opportunity to make a phone call or consult with counsel. The North Dakota Judicial Qualification Commission, the agency policing the conduct of State Judges, has found this to be a deliberate judicially approved act and an unreasonable delay. When taken before this magistrate, a part time criminal investigator and Special Agent for United States Air Force, no record was made of the proceedings. Instead the magistrate found her in contempt of court, sentenced her to 10 days in jail and then bargained away 5 of those days upon her promise not to appeal his contempt citation.

Respectfully Submitted,

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APPENDIX 1

File No. Crim. 611

STATE OF NORTH DAKOTA,
In the Supreme Court

Appeal from the County Court with
Increased Jurisdiction of Barnes County.

State of North Dakota,
Plaintiff and Appellee
v.
Julie Ann Goeller,
Defendant and Appellant

This action coming on to be heard at the January A.D. 1978 term of this Court at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Robert Vogel, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Roy A. Ilvedson, District Judge, Associate Justices; and a petition for a rehearing upon the appeal herein having been filed by Julie Ann Goeller, pro se, appellant, and the court having advised thereon, it is now here considered, ordered and adjudged, that the petition be and the same is hereby Denied.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated April 13, 1978

BY THE COURT,
Ralph J. Erickstad, C.J.

STATE OF NORTH DAKOTA,
IN THE SUPREME COURT,

The petition for a rehearing upon the appeal in the above entitled action is hereby DENIED.

Vernon R. Pederson
Robert Vogel
P.M. Sand
Ralph J. Erickstad, C.J.
Judges Supreme Court,
State of North Dakota.

The Honorable Roy A. Ilvedson, District Judge, did not participate on the Petition for Rehearing.

File No. Crim. 611

IN THE SUPREME COURT
State of North Dakota

State,
Plaintiff and Appellee
vs.
Goeller,
Defendant and Appellant

ORDER ON PETITION FOR REHEARING

Filed in Court this 13th
day of April, 1978

_____Clerk.

Remittitur sent down this 27th day of June, 1978.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff and Appellee
v.
Julie Goeller,
Defendant and Appellant

Criminal No. 611

Appeal from the County Court With Increased Jurisdiction of Barnes County, the Honorable George E. Duis, Judge.

AFFIRMED.

Opinion of the Court by Pederson, Justice.

Michael O. McGuire of Schuster, McGuire and Anderson, Box 2842, Fargo, for appellant.

John T. Paulson, State's Attorney, Box 209, Valley City, for appellee.

State v. Goeller

PEDERSON, Justice.

Julie Ann Goeller appeals a conviction by the Barnes County Court With Increased Jurisdiction (Judge George E. Duis of the Cass County Court presiding) of possession of a controlled substance, a Class A misdemeanor (§ 19-03.1-23(3), NDCC). A jury trial had been waived. We affirm the conviction.

Insofar as they are pertinent to this appeal, there are few significant factual disputes. Goeller, along with three other persons (Hillborn, Seaborn and Anderson), was present in the common kitchen area of a multiple dwelling (213 College Street Southeast) in Valley City, when two North Dakota Crime Bureau agents entered and observed marijuana on the kitchen table. All four were charged with possession of the marijuana; Goeller, Seaborn and Hillborn were convicted. The charge against Anderson was dismissed.

One of the Crime Bureau agents had reported to the Valley City police that he had previously purchased a controlled substance from Seaborn at this multiple dwelling and that he had been invited to return that night for a party. As a result, a police captain (Kracht) obtained a warrant for a search of the house at 213 College Street Southeast.

At about 11:00 p.m., members of the Valley City Police Department and the two agents of the Crime Bureau went to the residence at 213 College Street Southeast. A radio transmitter was concealed on the person of one of the agents. While the Valley City officers remained outside with the search warrant, the two agents approached the residence and sought entry. They did not identify themselves as law enforcement agents when the door was opened by Hillborn. They, instead, asked for Seaborn. Hillborn told them that Seaborn was present, then, as he states, "I yelled for Sheldon as I was running upstairs. I was going up the stairs to get a pair of shoes on." The agents then walked into the kitchen area. One of the agents recounts:

"When I entered the kitchen one of the individuals, I

can't remember right now, had a bag of marijuana sitting on the table between Sheldon Seaborn and herself and was rolling a marijuana cigarette. There were two females sitting on opposite sides of the table."

"At that point Miss Goeller stated that she recognized me and ... (the other agent) called the police officers from Valley City that were waiting outside by radio and had them enter the premises."

Without further delay, the Valley City officers entered the residence, arrested the individuals present, and began a search of the premises. The officers testified that all those arrested were read the rights as contained on "Miranda warning card." At some point during the arrest and search, Julie Goeller said that it was her marijuana and that they should leave the other people alone.

One of the agents testified that the execution of the search warrant by the Valley City police was delayed because they (the agents) wanted to try to make another purchase of a controlled substance from Sheldon Seaborn in order "to secure the case."

Goeller took the stand in her own behalf and disputed the testimony that she was given the *Miranda* warning. She said: "No, I was never read my rights. I asked Bernie Kracht to read me my rights and he refused." She does not deny making the statement that the marijuana was hers, but she says that it was made facetiously. She testified that when Captain Kracht asked her, "And what about this marijuana? Is this yours, Julie?" She said that her response was, "Oh, sure, Bernie, it's all mine."

When all testimony was concluded, and immediately prior to finding Goeller guilty, the judge made the following statements:

" . . . Miss Goeller if you said it was facetiously or not your statements were made and they are convincing to me viewed in the light of the officer's testimony.

"The only part of this matter that disturbs me at all was the dispute as to whether the Miranda Warnings were given and it is true that there was a good deal of confusion but the officers testified that they did. They are trained officers and I can't help but believe that they did give these warnings and there is a dispute in the evidence."

We first consider the question of whether the marijuana, which was plainly visible to the agent who gained entry by deception, was properly received as evidence or whether it should have been excluded as the product of an unconstitutional search.

We conclude, first of all, that the entry, while made by deception, did not violate Goeller's Fourth Amendment rights. Goeller argues, in her brief, that forcible and stealthy entry into an abode is prohibited by the Fourth Amendment. She then questions why trickery and deceit should stand on any higher ground. That question is answered, in part, by the often-quoted case of Sorrells v. United States, 287 U.S. 435, 441, 77 L.Ed. 413, 53 S.Ct. 210 (1932), where the United States Supreme Court said:
"Artifice and stratagem may be employed to catch those engaged in criminal enterprises."

The employment of such means to ensnare the criminal

has limits, however. The Supreme Court, in Hoffa v. United States, 385 U.S. 293, 301, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966) stated:

> "The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area." (Cites omitted.)

In a case with some similarities to that before this Court, the Eighth Circuit Court of Appeals held that the entry of an agent into the defendant's home by pretending to be a mutual friend of one of defendant's drug associates, "did not interfere with the defendant's Fourth Amendment rights and did not taint the evidence procured thereafter in the defendant's home." United States v. Raines, 536 F.2d 796, 800 (8th Cir. 1976), citing United States v. Syler, 430 F.2d 68 (7th Cir. 1970). The *Raines* court went on to quote from United States v. Glassel, 488 F. 2d 143, 145 (9th Cir. 1973), *cert. Denied,* 416 U.S. 941, 94 S. Ct. 1945, 40 L.Ed.2d 292 (1974):

> "(A)n officer may legitimately obtain an invitation into a house by misrepresenting his identity . . . . If he is invited inside, he does not need probable cause to enter, he does not need a warrant, and, quite obviously, he does not need to announce his authority and purpose. Once inside the house, he cannot exceed the scope of his invitation by ransacking the house generally, . . . but he may seize anything in plain view."

The defendant here relies upon two very old and distinguishable prohibition cases: Fraternal Order of Eagles, No. 778 v. United States, 57 F.2d 93 (3d Cir. 1932), and United States v. Mitchneck, 2 F.Supp. 225 (M.D. Pa.

1933). Both of those cases rely upon the following statement:

> "A search and seizure following an entry into the house or office of a person suspected of crime by means of fraud, stealth, social acquaintance, or under the guise of a business call are unreasonable and violate the Fourth Amendment." 57 F.2d at 94, and 2 F. Supp. at 226.

The source of this statement is Gouled v. United States, 255 U.S. 298, 306, 41 S. Ct. 261, 65 L. Ed. 647 (1921),[1] where it is stated:

> ". . . whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure ***subsequently and secretly made in his absence***, falls within the scope of the prohibition of the Fourth Amendment . . . ." (Emphasis added.)

Both *Eagles, supra,* and *Mitchneck, supra,* neglected to recognize the significance of the emphasized language in *Gouled, supra*. The *Gouled* court equated stealth with force and coercion. Gouled v. United States, 255 U.S. at 305, *supra*. The stealth referred to lies not in the *entry* but in a later *surreptitious* search.

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[1] The *Mitchneck* court incorrectly attributes the statement to Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1915).

Fraternal Order of Eagles, supra, has never been directly overruled by the Third Circuit, but it has been repeatedly qualified and distinguished in other circuits. United States v. Bush, 283 F. 2d 51 (6th Cir. 1960), provides an example.

After reviewing, among others, the same cases which are now cited by Goeller, the *Bush* court concluded:

> "As to misrepresentations made to Mrs. Bush, we are of the view that the only misrepresentation was that the agent hid his identity as an officer and posed as a member of the general public. Evidence obtained by law enforcement officers, using the subterfuge of hiding their identity in order to pose as members of the general public, has consistently been held to be admissible." (Cites omitted.) United States v. Bush, 283 F. 2d at 53, *supra.*

In Lewis v. United States, 385 U.S. 206, 211, 17 L.Ed. 2d 312, 87 S. Ct. 424 (1966), the United States Supreme Court was faced with a situation where an undercover narcotics agent falsely identified himself to the defendant as a marijuana dealer, and succeeded in being invited into the defendant's home, where drug purchases were made. In that case the Court held that:

> ". . . when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do

> business and may enter upon the premises for the very purposes contemplated by the occupant."

It is not necessary for us to say that, in the instant case, Hillborn and Seaborn had converted their place of abode into a "commercial center." The Crime Bureau agents stated that they returned because of an invitation to a *party,* not an invitation to transact any illegal business. We hold that the agents did not violate Goeller's Fourth Amendment rights.

> "Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se.* Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest." Lewis v. United States, 385 U.S. at 210, *supra.*

The Crime Bureau agents in this case may have traveled to the very boundary of the rights accorded under the Fourth Amendment; however, we do not believe they have crossed that boundary.

Goeller also asserts that the agents were not entitled to seize the marijuana under the doctrine of "plain view." See State v. Meadows, 260 N.W. 2d 328 (N.D. 1977); State v. Matthews, 216 N.W. 2d 90 (N.D. 1974); Harris v. United States, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968); Ker v. California, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), annotated, 29 L. Ed. 2d

1067. Goeller's attempt to read United States v. Goldenstein, 456 F. 2d 1006 (8th Cir. 1972), and Davis v. United States, 327 F. 2d 301 (9th Cir. 1964), which require the contraband to be within the officer's view "at the moment of intrusion," as support for excluding any contraband not within the agents' view as they were on the threshold, has no merit. Both of those cases require the "find" to be inadvertent as opposed to something searched for. So long as the agents remained in an area where they were invited, they were not required to close their eyes to the contraband. If an officer has a right to be in a position to view the contraband, he likewise has the right to seize the contraband. Harris v. United States, 390 U.S. at 236, 19 L. Ed. 2d at 1069, 88 S. Ct. at 993, *supra*. See also, Ker v. California, 374 U.S. at 43, 10 L. Ed. 2d at 743, 83 S. Ct. at 1643, *supra*.

While Goeller insists that the agents had entered the dwelling with the intent of searching it, the record makes clear the fact that the entry was made with the intent of attempting a "buy." The fact that the officers outside had armed themselves with a search warrant, and did intend a *later* search, has no bearing upon the intent behind the initial entry by the Crime Bureau agents.

Because we have concluded that the North Dakota Crime Bureau agents did not violate Goeller's Fourth Amendment rights when they entered the Valley City dwelling, and because we find that the marijuana was within plain view of those agents when it was seen upon the kitchen table, we conclude that those agents were entitled to summon the Valley City police officers, who were waiting outside, into the residence. The agents were witnesses to the ongoing commission of a crime and it was within their power to summon aid in order to make arrests and secure the evidence.

Because the contraband which was introduced as evidence against Goeller was properly seizable, we need not and do not consider the issues raised by Goeller concerning the issuance and execution of the search warrant.

Goeller argues that the incriminating statements she was found to have made should have been suppressed. She bases this argument, in part, upon the assertion of an illegal search and seizure and, in part, upon the assertion that the *Miranda* warnings were not given to her. We have previously found that there was no illegal search or seizure involved in acquiring the contraband which was used as evidence against her. The trial judge specifically stated that he believed the testimony of the officers when they stated that they had read the *Miranda* warnings to Goeller before she made the incriminating statements. We therefore hold that her statements were properly made a part of the evidence and were not subject to suppression. Goeller's contention that the statements were made facetiously was not accepted by the trial court. The court clearly indicated that the statements contributed to a finding of guilt. A conviction based on conflicting evidence will not be disturbed where there is substantial evidence to support the trial court's decision. State v. Schuler, 243 N.W. 2d 367 (N.D. 1976). See also, State v. Loucks, 209 N.W. 2d 772 (N.D. 1973). The trial court was not bound to accept Goeller's exculpatory explanation of her admission. See, State v. Lange, 255 N.W. 2d 59 (N.D. 1977); United States v. Wilkerson, 453 F. 2d 657 (8th Cir. 1971), *cert. denied*, Wilkerson v. United States, determining if there is substantial evidence to support the trial court's decision, we view the evidence in the light most favorable to the verdict. See, State v. Moe, 151 N.W. 2d 310 (N.D. 1967).

Goeller finally argues that she was denied the right to

bail and to effective counsel at trial because she was detained from 11:30 p.m. on Wednesday, March 30, 1977, until 1:45 p.m. the following Friday, April 1, 1977, without being allowed to contact counsel. We cannot agree that Goeller's Sixth Amendment right to counsel was violated for two reasons: (1) the incriminating statements which she was found to have made were made at the time of her arrest, and not pursuant to interrogation after she had made a request for counsel, and (2) the 38-hour period of time during which she was incarcerated without benefit of counsel does not, under all circumstances, present a *per se* violation of the prohibition against unnecessary delay (Rule 5a, NDRCrimP). Goeller acknowledges that the record gives absolutely no clues as to why over 38 hours elapsed before her first appearance. She concludes that she was effectively denied bail for reasons of prejudice and harrassment, contrary to Section 6 of the North Dakota Constitution. We cannot base the reversal of a conviction upon the mere assumption, by the defendant, that the motives of the Valley City Police Department were improper.

The judgment of conviction is affirmed.

Vernor R. Pederson
Robert Vogel
G.M. Sand
Ralph J. Erickstad, C.J.

ILVEDSON, District Judge, sitting in place of Paulson, J., disqualified.

APPENDIX 2

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff and Appellee
v.
Julie Goeller,
Defendant and Appellant
Criminal No. 625
State of North Dakota,
Plaintiff and Appellee
v.
Debra E. Anderson,
Defendant and Appellant

Criminal No. 626

Appeal from the Barnes County Court With Increased Jurisdiction, the Honorable C. James Cieminski, Judge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Opinion of the Court by Pederson, Justice.

Lundberg, Conmy, Nodland, Rosenberg, Lucas & Schulz, P.O. Box 1398, Bismarck, for defendants and appellants; argued by Irvin B. Nodland.

John T. Paulson, State's Attorney, Courthouse, Valley City, for plaintiff and appellee.

State v. Goeller
State v. Anderson

PEDERSON, Justice.

Julie Ann Goeller and Debra Elaine Anderson separately appealed from a "Judgment and Sentence of contempt of court.

Goeller and Anderson were present in the Barnes County Court of Increased Jurisdiction for an arraignment on a charge of possession of a controlled substance. Section 19-03.1-23(3), North Dakota Century Code. No record was made of the proceedings, other than two documents executed by the judge who presided at the arraignment, which were each labeled "Summary Contempt findings & Order."

The significant part of these two orders states:

> "During this arraignment proceeding the Court saw by its personal observation giggling, laughing, and smirking by the Defendant and a co-defendant . . . . The Court by simply stopping, remaining silent, and looking directly at the Defendant was able to restore proper courtroom decorum. When the giggling, laughing, and smirking resumed, the Court stopped and directly said words to the effect that this is an important matter, you face a serious charge, now please pay attention. Again, proper courtroom decorum was restored. On the third occassion of giggling, laughing, and smirking, the Court found the Defendant . . . . to be in Summary Contempt; . . ."

In the one document, Goeller was identified as defendant and Anderson as the codefendant. In the other document, Anderson was identified as the defendant and

Goeller was identified as codefendant. Otherwise, the pertinent provisions in the two orders are identical. Each defendant was ordered remanded to the custody of the sheriff of Barnes County for ten days and, after five days had expired, each of the orders was vacated.

A number of affidavits were filed by the defendants and by the State, pursuant to Rule 10(d), North Dakota Rules of Appellate Procedure. These affidavits do not supply any information needed by this Court in determining the issues before it.

During pendency of these appeals, the two appellants have taken steps seeking to have the appeals stayed and the matters remanded to the trial court for the purpose of obtaining evidentiary hearings, and for proceedings under the Uniform Post-Conviction Procedure Act, Ch. 29-32, NDCC. Appellants have assumed that these interim steps make it unnecessary to comply with the Rules of Appellate Procedure. No briefs on the merits of the appeals have been filed and no applications have been made for extensions of time. See Rules 26 and 31, NDRAppP. We do have, however, the briefs of the parties on the interim motions, and have heard oral arguments which included arguments on the merits. We therefore decline to stay the appeal or to remand for further proceedings below. The merits of the appeals are properly before us.

The power of courts to summarily exercise powers of contempt has been long recognized. The United States Supreme Court, in In re Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888), approved, in a contempt case, the infliction of instant punishment without charges, without plea, without issue, and without trial. This Court first commented on such summary power in State v. Root, 5 N.D.

487, 67 N.W. 590 (1896). As recently as Klein v. Snider, 253 N.W. 2d 425 (N.D. 1977); State v. Stokes, 243 N.W 2d 372 (N.D. 1976); LePera v. Snider, 240 N.W. 2d 862 (N.D. 1976); and State v. Stokes, 240 N.W. 2d 867 (N.D. 1976), we have recognized the propriety of summary punishment for direct contempts committed in the presence of the court. In State v. Heath, 177 N.W. 2d 751 (N.D. 1970), we said that "petty" contempts could be punished summarily.

Persons who perform offensive acts before a court may be instantly held guilty of contempt without violating constitutional rights. See Knox v. Municipal Court of City of Des Moines, 185 N.W. 2d 705 (Iowa 1971).

Rule 42(a), NDRCrimP, which superseded § 27-10-06, NDCC, as to criminal contempt, applies to this case. It states:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Where the contempt is direct, the court may invoke punishment in a summary manner. Since the court, in such a situation, has personal knowledge of the contumacious conduct, it may invoke its sanction without prior notice, written charges, plea, issue or trial. Further presentation of evidence is unnecessary and no record need be made. See Estate of Shlensky, 49 Ill. App. 3d 885, 364 N.E. 2d 430, 436 (1977). See also, Wright, Federal Practice and Procedure, Criminal § 708, Procedure for

Summary Contempt. The California Court of Appeals, in Rosenstock v. Municipal Court of Los Angeles, 61 Cal. App. 3d 1, 132 Cal. Rptr. 59, 61 (1976), said:

> "Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be made reciting the facts, adjudging the person guilty, and prescribing the punishment."

Courts have not in the past, nor do we now construe summary contempt power to be *carte blanche*. The power to impose summary punishment exists only where there is compelling reason for an immediate remedy and, where there is no such need, its use is inappropriate. See United States v. Wilson, 421 U.S. 309, 95 S. Ct. 1802, 44 L. Ed. 2d 186 (1975), and United States v. Brannon, 546 F. 2d 1242 (5th Cir. 1977).

Justice Black's opinion in Re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948), pointed out circumstances wherein summary contempt proceedings provide a "narrow exception" to due process requirements. *Only* when the conduct is in open court and in the presence of the judge, when it disturbs the court's business, and when "immediate punishment is essential to prevent demoralization of the court's authority," can it be justified. See, also, Cooke v. United States, 267 U.S. 517, 539, 45 S. Ct. 390, 69 L. Ed. 767 (1925), where the court said:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important

and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions."

See, also, Ciraolo v. Madigan, 443 F. 2d 314 (9th Cir. 1971).

Justice Douglas, in delivering the opinion of the Court in Mayberry v. Pennsylvania, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971), said:

"Justice must satisfy the appearance of justice."

The Supreme Court of California said, in People ex rel. Field V. Turner, 1 Cal. 152, 153 (1850), and has often repeated, that "the power to adjudicate a direct contempt is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct." See Lyons v. Superior Court, 278 P. 2d 681, 685 (Cal. 1955).

In State v. Stokes, 240 N.W. 2d at 871, *supra*, we said that contempt powers should not result in over-kill. We adhere to the principle that only "the least possible power adequate to the end proposed" should be used in contempt cases. United States v. Wilson, 421 U.S. at 319, *supra*. We referred to Part VII of the *ABA Project on Standards for Criminal Justice*, "Standards Relating to the Function of the Trial Judge," Approved Draft 1972. We also applied these standards in LePera, *supra*. Part VII provides:

"7.1 Inherent power of the court.

The court has the inherent power to punish any contempt in order to protect the rights of the defendant and the interests of the public by assuring that the administration of criminal justice shall not be thwarted. The trial judge has the power to cite and, if necessary, punish summarily anyone who, in his presence in open court, willfully obstructs the course of criminal proceedings.

"7.2 Admonition and warning.

No sanction other than censure should be imposed by the trial judge unless

(i) it is clear from the identity of the offender and the character of his acts that disruptive conduct was willfully contemptuous, or

(ii) the conduct warranting the sanction was preceded by a clear warning that the conduct is impermissible and that specified sanctions may be imposed for its repetition.

"7.3 Notice of intent to use contempt power; postponement of adjudication.

(a) the trial judge should, as soon as practicable after he is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of his intention to institute such proceedings.

(b) The trial judge should consider the advisability of deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney or a witness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

"7.4 Notice of charges and opportunity to be heard.

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

"7.5 Referral to another judge.

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved, or his objectivity can reasonably be questioned."

Our evaluation of the contempt orders in these cases, even without applying these standards, leads us to conclude that the trial judge acted improvidently in imposing the harsh sentence. We readily acknowledge that "giggling, laughing, and smirking" can be disturbing to a judge and a reprimand would be entirely justified. The disrupting conduct was admonished by the judge in these cases, as it should have been. There was, however, no clear warning as to the specific sanction to be imposed for the repetition of the conduct. Under the circumstances here, the sanction of ten days incarceration in the county jail was arbitrary, was not necessary to prevent demoralization of the court's authority, and does not satisfy the appearance of justice. It was clearly an "over-kill" and was apparently later recognized as such by the trial judge when he subsequently vacated one-half of the sentence.

We affirm the contempt conviction, but vacate the sentence and remand for sentencing by a judge to be appointed by the presiding judge of the First Judicial District. The resentencing may be based upon the summary contempt findings now in the record or upon such further hearing as determined necessary by the judge. No costs will be allowed on the appeal.

Vernon R. Pederson
Larry M. Hatch
Robert Vogel
P.M. Sand
Ralph J. Erickstad, C.J.

Hatch, District Judge, sitting in place of Paulson, J., disqualified.

APPENDIX 3

STATE OF NORTH DAKOTA
County of Barnes

In
County
Court
With Increased Jurisdiction

State of North Dakota
Plaintiff
Wade
Sheldon Wade Seaborn
Defendant

STATE OF NORTH DAKOTA
County of Barnes

Bernard Kracht, being first duly sworn, does depose and say that on the 30th day of March, 1977, at said County, on said date at or about 7:00 p.m., your affiant received information from Dan Smith, an agent for the North Dakota crime bureau, informing your affiant that he had made a purchase of two bags of a controlled substance, believed to be marijuana, from Sheldon Seaborn. Said purchase being made at a house located at 213 College St. Southeast, Valley City, North Dakota. Your affiant has had previous experiences and has received valid information from Dan Smith and can vouch for his credibility. Your affiant seeks this warrant so that the Valley City Police may search said house at 213 College St. SE. That the personal property for which search is prayed is situated in said County and State and is particularly described as follows, to-wit:

Controlled substances.

and may now be found on the person of Sheldon Wade Seaborn or in the house situated 213 College St. South east, Valley City, ND

WHEREFORE, Affiant prays that a Search Warrant may issue, commanding a peace officer of said County to search for the personal property hereinbefore described.

Subscribed and sworn to before me this 30th day of March 1977.

C. James Ceiminski, County Judge

Bernard Kracht

APPENDIX 4

STATE OF NORTH DAKOTA
County of Barnes

In the Name of the State of North Dakota

To Any Sheriff, Constable, Marshal or Policeman in the County of Barnes.

Proof by affidavit having been this 30th day of March, 1977, made before me by Bernard Kracht.

that there is probable cause for believing that Sheldon Seaborn sold two bags to a controlled substance to Dan Smith, an agent for the North Dakota Crime Bureau. Said transaction being made at 213 College St. Southeast, Valley City, North Dakota.

You are therefore commanded, in the day time (or at any time of the day or night), to make immediate search on the person of Sheldon Seaborn and in the house situated 213 College St. South east, Valley City, ND for the following property:

Controlled substances

and if you find the same, or any part thereof, to bring it forthwith before me at my office in the City of Valley City, County of Barnes, State of North Dakota, and to arrest the person in whose possession the said property may be found in order that such person may be dealt with according to law.

Dated at Valley City the 30th day of March, 1977.

C. James Ceiminski, County Judge in and for Barnes County, North Dakota.

APPENDIX 5

BEFORE THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

UNDER THE RULES OF THE JUDICIAL QUALIFICATIONS COMMISSION.

IN THE MATTER OF DISCIPLINARY ACTION AGAINST C. JAMES CIEMINSKI, JUDGE OF THE BARNES COUNTY COURT WITH INCREASED JURISDICTION, BARNES COUNTY NORTH DAKOTA.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

The Judicial Qualifications Commission with Vice Chairman, Lowell Lundberg, presiding; having met on the 9th, 10th and 11th of January, 1978, in the Chambers of the Barnes County Commissioners, Barnes County Courthouse, Valley City, North Dakota, with the Respondent, C. James Cieminski; his attorney, William Yuill; and Staff Attorney, Gregory D. Morris, present and after having received testimony and based upon all files and records in the above-stated matter, now makes the following Findings of Fact, based upon evidence clear and convincing, Conclusions of Law and Recommendations to the Supreme Court.

I.

A written letter of complaint was filed on September 2, 1977 with the North Dakota Judicial Qualifications Commission against the Respondent, C. James Cieminski, as Judge of the Barnes County Court with Increased Jurisdiction, Barnes County, North Dakota.

II.

The Respondent was appointed to the position of Judge of the Barnes County Court in May of 1973 and was elected to that position in November of 1974 and has held that position ever since.

III.

The Respondent was notified of the letter of informal complaint pursuant to Rule 6(b) RJQC by letter dated September 6, 1977, at which time he was afforded an opportunity to respond to the complaint, a copy of which was enclosed with that letter.

IV.

The Respondent, by letter of September 22, 1977, indicated his response was a complete denial of the charges contained in the letter of complaint.

V.

An investigative report was submitted by the Staff Attorney on October 14, 1977 and the Commission met on October 19, 1977 to consider the matter. The Respondent had declined an invitation by the Staff Attorney to attend the meeting by letter of October 18, 1977. At that meeting the Commission voted to initiate a formal complaint and instructed the Staff Attorney to prepare a formal notice and charges.

VI.

The notice of formal charges was personally served upon the Respondent pursuant to Rule 8 RJQC on October 31, 1977.

VII.

A response to the charges was mailed to the Staff Attorney and Jane Knecht, Chairperson of the Judicial Qualifications Commission, by the Respondent and was filed with the Secretary of the Commission by the Staff Attorney on November 17, 1977. The response flatly denied all of the allegations in the complaint with the possible exception of the allegation of a failure to have a record made of the proceedings and made a request to have an independent investigator assigned.

VIII.

The Commission met on November 29, 1977 and determined that the request for an independent investigator would be denied and that the formal hearing would be held before the full Judicial Qualifications Commission on the 9th, 10th and 11th days of January, 1978, at the Barnes County Courthouse. The Chairperson of the Commission notified the Respondent of the time and place of the formal hearing pursuant to Rule 10 RJQC on December 1, 1977.

IX.

A notice of amended charges was personally served on the Respondent on December 13, 1977 and filed with the Judicial Qualifications Commission. No response was received or filed with the Commission to the amended charges.

X.

The formal hearing was held on the 9th, 10th and into the morning of the 11th of January, 1978, at the Barnes County Courthouse in Valley City, North Dakota. The Respondent was present throughout the entire proceedings and was represented by counsel.

XI.

The Respondent willfully caused and allowed an unreasonable delay in the arraignment of Julie Ann Goeller and Debra Anderson on Class A misdemeanor charges of possession of a controlled substance on March 31st and April 1st of 1977 by failing to bring them before himself as magistrate and Judge of the Barnes County Court with Increased Jurisdiction. The Respondent has been made aware of their incarceraction and had adequate opportunity to hold an appearance prior to the April 1st arraignment of these two women. The Respondent failed to arraign the complainants in a reasonable time for the reason that they were not taking the matter seriously.

XII.

The Respondent communicated the fact of the delay and the reason for the delay at the arraignment of Tad Hilborn, Terry Enervold and Evelyn Peterson in a manner indicating not only his knowledge of the delay and his approval of that delay but his entire involvement in it on March 31, 1977.

XIII.

The Respondent made the statement that, Julie Ann Goeller was living at a house with four felons, which statement was false, inaccurate and misleading regarding the character and actions of Ms. Goeller, to Mr. William A. Mackenzie on April 3, 1977, in a manner totally inappropriate to his position as Judge of the Barnes County Court with Increased Jurisdiction.

XIV.

The Respondent failed to comply with the North Dakota Rules of Criminal Procedure in the arraignment

of Julie Ann Goeller and Debra Anderson on April 1, 1977 by not having a verbatim record of the proceedings kept either by a court reporter as required for courts of record or by a mechanical recording of the proceeding.

XV.

The Respondent willfully gave the appearance of, entered into and did bargain five days of a criminal contempt sentence of Julie Ann Goeller and Debra Anderson in exchange for the nonfiling of an appeal regarding that same contempt charge on April 4, 1977.

XVI.

The Respondent read mail belonging to an inmate of the Barnes County Jail on April 2, 1977, without being aware of what it was at the time it was handed to him to read.

XVII.

The Respondent is a Reservist in the United States Air Force. He is assigned to the Air Force Office of Special Investigations, Detachment 1313, Grand Forks Air Force Base, North Dakota. The Respondent has been a Special Agent for the Air Force Office of Special Investigations for a number of years, in which time he has conducted numerous investigations regarding criminal matters as well as other matters under the various missions of the Air Force OSI. As an agent for the Air Force OSI, he has conducted two investigations in North Dakota outside the confines of the Grand Forks Air Force Base, in Barnes and Stutsman Counties, within the past two years, neither of which involved any criminal activity or other activity of a nature likely to result in appearances before him as judge.

XVIII.

As an agent for the Air Force Office of Special Investigations, he was issued a set of credentials for use in his official Air Force capacity only, consisting of two laminated cards in a black folder as well as a metal badge in a separate leather folder. These credentials are normally either picked up personally or mailed to him by the Commander of Detachment 1313 for his use and returned to the Commander in the same manner after the completion of the assignment.

XIX.

That the Respondent did on five occasions display to eight individuals a badge or credentials issued to him as an Air Force reservist assigned to Air Force Office of Security Information, that his apparent purpose in doing so was to impress the viewers with the fact that he held such as assignment, that the effect of his doing so was to create in the minds of the viewers that he was involved in investigations for the purpose of prosecution while at the same time sitting as a judge in similar cases.

XX.

The Respondent, in the course of his years as judge, has handled personal checking accounts on behalf of persons in his community, who for one reason or another were and are having difficulty in managing their own finances, placing himself in a fiduciary relationship with these individuals and in a position detrimental to the performances of his judicial duties.

XXI.

The Respondent has and is handling a checking account on behalf of Mr. Byron Kreie, an individual who has been named in a suit for the collection of a debt through the Barnes County Small Claims Court, over which the Respondent presides.

XXII.

The voluntary action of the Respondent in taking on these fiduciary duties regarding Mr. Kreie has created a conflict and has interfered with his performance of his official duties as Judge of the Barnes County Small Claims Court.

XXIII.

While recognizing the right of every citizen to file a complaint with the Commission involving the conduct of the judges of the State of North Dakota and not withstanding the preceding findings of misconduct, in its decision the Commission is sensitive in this case to what appears to be an organized, orchestrated, vindictive campaign by one or more of the complaining parties.

CONCLUSIONS

Upon the foregoing Findings of Fact, the Commission concludes:

1. The Judicial Qualifications Commission has jurisdiction over C. James Cieminski as Judge of the Barnes County Court with Increased Jurisdiction and has jurisdiction over the subject matter of the complaint.

2. The Commission received a written letter of complaint, furnished notice of the complaint, instituted and conducted formal proceedings regarding the above-entitled matter pursuant to and in accordance with all of the rules of the Judicial Qualifications Commission and appropriate sections of the North Dakota Century Code.

3. The conduct of the Respondent, as outlined in Findings XI., constitute a willful violation of Judicial

Canons 1, 2 A., 3 A. (1) and 3 A. (5) and the willful failure to perform his duties as prescribed by law, as well as willful misconduct in office.

4. The conduct of the Respondent, as outlined in Findings XIII constitutes willful misconduct in office and a willful violation of Judicial Canon 1 and 2 A.

5. The conduct of the Respondent, as outlined in Finding XIV., constitutes a willful failure to perform his duties as prescribed by Rule 1 and Rule 11(f), N.D.R.Crim. P. and a willful violation of Judicial Canons 1, 2 A. and 3 A. (1).

6. The conduct of the Respondent, as outlined in Finding XV., constitutes willful misconduct in office and a willful failure to perform his duties as prescribed by Rule 56 N.D.R.Crim. P. and a willful violation of Judicial Canons 1, 2 A., 3 A. (1) and 3 A. (4).

7. The conduct of the Respondent, as outlined in Finding XVI., constitutes misconduct in office and a violation of Judicial Canons 1 and 2 A.

8. The conduct of the Respondent, as outlined in Finding XIX., constitutes willful misconduct in office and a willful violation of Canons 1, 2 A. and 5 A.

9. The conduct of the Respondent, as outlined in Findings XX., XXI. and XXII., constitute willful violations of Judicial Canons 5 A and 5 D.

RECOMMENDATION

WHEREFORE, the Commission finding good cause, therefore, recommend to the Supreme Court the following disciplinary action:

(1) Suspension from office without salary.

(2) Suspension shall continue for a period of not less than ninety days and as a condition of reinstatement, the Respondent must make a significant study of judicial conduct and judicial ethics or such other appropriate study as the Supreme Court may deem necessary.

Date this day of April, 1978.